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Archibald Douglas of Douglas, Esq; an Infant, and his Guardians, Her Grace the Dutches Dowager of Douglas, His Grace the Duke of Queensberry, and others, - } Appellants.

His Grace the Duke of Hamilton, Lord Douglas Hamilton, and their Guardians, Sir Hew Dalrymple, Bart. and others, - } Respondents.

Et e Contra,

CASE of Archibald Douglas, Esq; Appellant, in the Original, and Respondent in the Cross Appeal.

IT appears from the antient Investitures of the Family of Douglas, That the Estate and Dignity were originally descendible to Heirs General; but afterwards, in 1547, they were limited to Heirs Male, and continued so until the Year 1699, when James Marquis of Douglas executed a Settlement or Nomination of Heirs, whereby, in Default of Heirs Male of his own or of his Son's Body, he called to the Succession the Heirs Female of his Son's Body; and failing these, the Heirs Female of his own Body.

James Marquis of Douglas died in 1700, leaving Issue Archibald (soon after created Duke of Douglas) lately deceased, and Lady Jane Douglas (the Appellant's Mother) both then Infants.

In 1707, a Charter passed under the Great Seal of Scotland, which was ratified in Parliament, erecting the Estate into a Dukedom, and granting the same to the said Archibald Duke of Douglas, and the Heirs of his Body: Remainder to the Heirs having Right to succeed by the foresaid Deed of Settlement executed by James Marquis of Douglas in 1699.

The Duke of Douglas executed, at three different Times, Settlements of his whole Estate, in favour of his only Sister Lady Jane, for whom he manifested the most sincere Affection, often soliciting her in the most pressing Manner to marry.— Having retired to the Country about the Year 1730, he lived in a very recluse Manner, and, by the Influence of Persons very adverse to his Sister's Interest, it appears he revoked the Settlements in her Favour, and afterwards executed other Settlements in favour of the Duke of Hamilton, who was considered as the Heir Male of the Family, though in a distant Degree of Relation, as being descended of a younger Son of the Family of Douglas, who was married to the Heiress of Hamilton about the Middle of the last Century.

In August 1746, Lady Jane, then in the 48th Year of her Age, was married to John Stewart, Esq; now Sir John Stewart of Grantully, Bart. who, though of a good Family, and presumptive Heir of an opulent Estate, had then no Fortune, and Lady Jane, having only an yearly Annuity of 300 l. from her Brother, it became adviseable for them, in these Circumstances, to go abroad for some Time, where they might live at a less Expence, and without keeping up any Rank: Accordingly they set out soon after their Marriage; and after passing some Time at the Hague and Utrecht, they took up their Residence at Aix la Chapelle, in April 1747: They were then attended by Mrs. Helen Hewit, a Maiden Gentlewoman, who had lived, for many Years, with Lady Jane in Quality of a Companion, and two Servant Maids.

Towards the End of the Year 1747, Lady Jane proved with Child, and her Pregnancy soon after became visible to all her Acquaintance at Aix la Chapelle.—In Spring 1748, she wrote to her Brother, acquainting him of it.—In May that Year, finding the Time of her Delivery approaching, and the Expence of Living greatly increased, by the Congress to be held at Aix la Chapelle, she resolved to leave that Place.—She set out from thence, and having stopped a few Days at Leige and at Sedan, she and her Family arrived at Rheims en Champagne; and after staying there some Weeks, Lady Jane, Sir John, and Mrs. Hewit set out for Paris, where they arrived upon the 4th of July, and upon the 10th of the same Month, Lady Jane was safely delivered of the Appellant and his twin Brother Sholto, in the House of Madame La Brune, in or near the Faubourg St. Germain.

No sooner had the News of Lady Jane's Delivery reached Scotland, than the most unjustifiable Methods were used to turn this happy Event to her Prejudice.—Reports were artfully raised, to create a Suspicion that Lady Jane had never been with Child, and it was even affirmed that her two Sons had been purchased out of an Hospital in Paris.—These injurious Reports were never heard of in any Part except in Scotland; and as they were artfully insinuated by ill designing Persons, they made such an Impression on the Duke of Douglas, that in August 1749, he revoked his Sister's Annuity.

Lady Jane and her Husband returned to England with their Children in the End of 1749; and in August 1752, Lady Jane made a Journey to Scotland, but found her Brother, the Duke, so unfortunately beset by Persons adverse to her Interest, that she could have no Access to see him.

In May 1753, Sholto the youngest Twin died, and this Event threw Lady Jane into the deepest Melancholy, and she died in November thereafter.

In 1754, it appears the Duke of Douglas executed a Deed, whereby, in Default of Heirs of his own Body, he settled his Estate upon the Family of Hamilton; and in 1757, he executed another Deed upon the same Heirs, in which he declared it to be his

his Intention, that the Children of his Sister should in no Event succeed to his Estate.—Both these Deeds were revocable at Pleasure.

The Duke of Douglas marries in 1753.

In 1758, the Duke of *Douglas* married the present Dutchess Dowager, and soon after he was prevailed with to live in a Manner less retired, and more suitable to his Rank and Fortune.—As he had then an Opportunity of conversing with disinterested Persons who could inform him of the Truth, he became satisfied of the Injustice of those Reports which had been spread to his Sister's Disadvantage.

Marriage Contract between the Duke of Douglas and the present Dutchess Dowager, 6th Aug. 1759.

By Articles in 1759, executed after Marriage, between the Duke of *Douglas* and the present Dutchess Dowager, he devised his whole Lands and Estate to the Heirs Male or Female of his Body; Remainder to such Heirs as he had already named, or should thereafter name; Remainder to his own nearest Heirs and Assigns whatever.

Deeds in favour of the Family of Hamilton revoked and cancelled.

Upon the 5th of *January* 1760, the Duke revoked and cancelled the Settlements executed in 1754 and 1757, upon the Family of *Hamilton*.

Deed of Entail, 11th July, 1761, in Favour of the Appellant.

Upon the 11th of *July* 1761, the Duke of *Douglas* executed a Disposition and Entail of his whole Land Estate in Favour of himself and the Heirs whatsoever of his Body; Remainder to the Heirs whatsoever of the Body of his Father *James Marquis of Douglas*; Remainder to the Respondent Lord *Douglas Hamilton*, Brother of the present Duke of *Hamilton*, and the Heirs Male of his Body; Remainder to Lord *Archibald Hamilton*, second Brother of the deceased *James Duke of Hamilton*, and the Heirs Male of his Body; Remainder to Lord *Spencer Hamilton*, third Brother of the said deceased *James Duke of Hamilton*, and the Heirs Male of his Body; Remainder to the Heirs Male of the deceased Lord *Basil Hamilton*, Son of the deceased Lord *William Douglas*, Grand Uncle of the late Duke of *Douglas*, who was first created Earl of *Selkirk*, and afterwards Duke of *Hamilton*; Remainder to the Heirs Male of the deceased Lord *Archibald Hamilton*, Son of the said *William Duke of Hamilton*; Remainder to the second Son of the Duke, or Heir of the Family of *Hamilton*, and the Heirs Male of the Body of the said second Son; Remainder to the third, fourth or youngest Son of the said Duke or Heir of the Family of *Hamilton* for the Time, in their Order, and the Heirs Male of their Bodies; Remainder to the other Heirs Male of the Body of the said Duke of *Hamilton*; excluding always the Duke or Heir of the Family of *Hamilton* for the Time, and his eldest Son or Apparent Heir; Remainder to the said *Archibald Duke of Douglas* his Heirs Male whatsoever; Remainder to his nearest and lawful Heirs and Assigns whatsoever.

The Duke of Douglas appoints the Dutchess of Douglas, the Duke of Queensberry and others, to be the Appellant's Guardians.

Of the same Date the Duke executed a separate Deed, setting forth, "That in the Event of his Death, without Heirs of his Body, *Archibald Douglas*, alias *Stewart*, a Minor, and Son of the deceased Lady *Jane Douglas*, his Sister, would succeed to him in his Lands and Estate:" He therefore appointed the Dutchess of *Douglas*, his Grace the Duke of *Queensberry*, and several other Noble and Honourable Persons, to be his Tutors and Curators.

Death of the Duke of Douglas in 1761, and Service of the Appellant, as Heir to him.

The Duke of *Douglas* died on the 21st of *July* 1761, and the Appellant's Guardians soon after proceeded to establish his Right as Heir of Tailie and Provision to his Uncle.—By the Forms of the Law of *Scotland*, Services of Heirs proceed upon a Writ called a Brieve, from his Majesty's Chancery, for enquiring, by a Jury of 15 sworn Men, whether the Person claiming the Succession, is the nearest Heir of the Person deceased, what Lands he died seised of, their Manner of Holding, &c.—In taking the Proof of the Claimant's Propinquity, it is not usual to bring any other Evidence, than the common Belief and Reputation, or that the Claimant is *habite and reputed* to be of such a Relation to the Deceased as is set forth in the Claim.—But as the Appellant had been born in a foreign Country, and Attempts had been made to throw Suspicion on his Birth, it was judged proper, on this Occasion, to bring all the Evidence that could easily be obtained by Persons residing in or near *Edinburgh*.

Printed Service, Pages 8, 9, 10, 11, 16, 17, 18, and 19.

It is proved by the concurring Evidence of the Countess Dowager of *Wigtoun*, *James Hepburn of Keith*, Esq; Mrs. *Hepburn* his Wife, Mrs. *Helen Hewitt*, Mrs. *Jean Greig* and *Isabel Walker*, who had all daily Occasion to see and converse with Lady *Jane Douglas* at *Aix la Chapelle*, That she was far advanced in her Pregnancy in *April* 1748; and the Facts and Circumstances they mention, are such as put this Matter beyond the Possibility of a Doubt.

Page 11, &c.

It is proved, Lady *Jane* left *Aix-la-Chapelle* the 1st of *June*, 1748, on account of the extraordinary Expence occasioned by the great Resort of Company to the Congress appointed to be held there;—That she proceeded to *Rheims*, and having staid there some Weeks, she went to *Paris*, leaving two Servant-Maids at *Rheims* to follow her, as soon as she could obtain a proper Supply of Money; and that when she arrived at *Paris*, she had only one *Louisdore* remaining.

P. 12, 20, &c.

P. 12, 35, 36, &c.

It is proved, that on the 10th of *July*, 1748, Lady *Jane* was delivered at *Paris* of two Sons (the Appellant and his Twin-Brother *Sholto*) and Mrs. *Helen Hewitt*, who was present, deposes as to the whole Particulars relating to the Birth and Treatment of the Children.

P. 10, 13, 29.

It is proved, that upon Lady *Jane*'s Return to *Rheims* in *September*, 1748, she again proved with Child, and by an Accident in returning from a Visit to Lady *Wigtoun*, she miscarried.

Mrs. Hepburn, P. 10, &c. P. 24.

It is proved, by many Witnesses, and by original Letters and Writings exhibited, that these two Children were treated by Sir *John* and Lady *Jane* on all Occasions with the utmost Tendernefs and Affection, and that the youngest Child was the very Picture of his Mother; and more particularly, *Joseph Douglas* of *Edrington*, Esq; deposes, That having gone to wait on Lady *Jane* two Days before her Death, she presented the Appellant to him as her Son.—"That the following Day, he went to dine with Lady *Jane*, and after Dinner she turned serious, and told him that she knew she was dying, and expressed no Concern for her approaching Death, but seemed to be greatly afflicted what would become of her dear Son *Archibald* when she was gone: And upon this Occasion she fell a crying, and seemed to be deeply afflicted; and thereupon the Deponent a little after left her, not being able to stand it longer."—And Mr. *William Loch*, Mrs. *Greig*, and others, depose, particularly as to the same anxious, tender, and unaffected Concern shewn by Lady *Jane* to her Children: "That she behaved in the most motherly and affectionate Way to them, that they were her whole Concern, and that if they were well, all was well with her.—That on her Death-bed she spoke anxiously to her Son *Archibald*—That she hoped all would be well with him.—That she despised the Stories that had been talked, that *Archibald* was not her Son; and the Deponent having asked Lady *Jane* if she had taken any Step to prove that he was hers, she answered, That it was an unprecedented Thing to take any Step of that kind; and if any Body doubted of it, it was their Business to prove that the Child was an Impostor, which she knew was impossible, for Sir *John Stewart* owned the Child as his, and knew it, and God knew that the Child was hers."—Mrs. *Hewitt* further deposes, "That about four Hours before Lady *Jane* died, she ordered her Son *Archibald* to be brought to her, when she laid her Hand upon his Head, and said, God blefs you, my Child; God make you a good and an honest Man, for Riches I despise; take a Sword in your Hand, and you may one Day be as great a Hero as some of your Predecessors."

P. 25, 26, 27 and 28. P. 17.

P. 14.

P. 23.

In the Course of the Service, Mr. *George Lindsay*, Town-clerk of *Edinburgh*, exhibited four Letters from *Pierre la Marr*, a Man-Midwife at *Paris*, several Letters from the Countess of *Bassevits* to Lady *Jane*, and other Letters and Writings, which were found by him in a Trunk sent by Lady *Jane* to his House, for Custody, before she went to *London* in *March* 1753: But these Letters or Writings were not read as any Part of the Evidence to the Jury.

P. 32.

The Council on Behalf of the Duke of *Hamilton* and the Earl of *Selkirk*, who attended the Service, and had cross-interrogated the Witnesses, having been asked if they had any Proof to offer, or Objection to make to the Claimant's being served Heir to the late Duke of *Douglas*, declared, that they demanded no Proof; whereupon the Jury unanimously, and without Doubt or Hesitation, returned their Verdict, serving the Appellant Heir of Tailie and Provision to the said deceased *Archibald Duke of Douglas*, his Uncle.

Soon

old Family Estate
claimed by the Duke
Hamilton and the Earl
Selkirk, but Judgment
was in Favour of the
Appellant.
December, 1762.

Soon after the Appellant's Service was completed, and he had attained Possession of the Estate, Actions were brought at the Instance of the Duke of Hamilton, and the Earl of Selkirk, for declaring their Right to the ancient Estate of the Family, which the Duke of Hamilton maintained was limited to Heirs Male by a Deed in 1630; and the Earl of Selkirk claimed in Virtue of a Deed executed by James Marquis of Douglas, the 9th of March 1699.—Upon the 9th of December 1762, it was unanimously determined by the Court of Session, That the Duke of Hamilton had no Claim to any Part of this Estate, either upon the Deed 1630, the Deed 1699, the Charter 1707, or any of the after Settlements; and the Appellant was preferred to both the noble Claimants, as well upon the Construction of the more ancient Settlements, as upon the later Deeds executed by the Duke himself.

Andrew Stewart
went to France in July
1762, and Actions of
Detraction are brought
for setting aside the Ser-

Before the Claims upon the Construction of the Family Deeds were determined, Andrew Stewart an Attorney at Edinburgh, the common Agent of the Family of Hamilton, and who had been appointed one of the Tutors of the present Duke of Hamilton, went to France, with an Intention, as now appears, of searching for Evidence concerning Lady Jane Douglas's Pregnancy and Delivery.—In this secret Investigation he was employed for many Months, without the least Notice of any Kind given to the Appellant's Friends, until at last, in December 1762, when the Court of Session was ready to give Judgment upon the forefaid Claims, it was confidently asserted that Mr. Stewart was in Possession of the most clear and irrefragable Evidence of the Appellant's being an Impostor. And upon the 7th of that Month, a Summons was executed in Name of the Duke of Hamilton, concluding that the Appellant's Service, as Heir to the Duke of Douglas his Uncle, ought to be set aside, upon this general Ground, that it had proceeded upon false Evidence; and that the Appellant was not really the Son of Lady Jane Douglas.—The like Actions were instituted at the Instance of Lord Douglas Hamilton, who was called by the Duke of Douglas's last Settlement as next Heir failing the Appellant; and at the Instance of Sir Hew Dalrymple, Bart. pretending to be one of the Heirs of Line of the Duke of Douglas, entitled to the Succession on Failure of the Appellant.

An Action of Declarature was soon after brought, at the Appellant's Instance, against the Earl of Hyndford, Sir Robert Menzies of Weem, Bart. and John Swinton of Swinton, Esq; the other pretended Heirs of Line of the late Duke of Douglas, and against the Earl of Selkirk, claiming the Succession in virtue of the Deed in 1699, to have it found and declared, that the Appellant was duly and legally served Heir to the Duke of Douglas his Uncle.

The Plaintiffs applied
for a Proof in retentis,
on the 9th of Decem-
ber, 1762, but re-
fused to give in any Part
of the Facts.

By the Forms of the Court of Session, a certain Number of Days are allowed to the Defendants, from the Time of Citation, before the Action can be regularly called in Court; and in Processes of Reduction, even after the Action is called, no Proof can be allowed, until the Plaintiff condescend specially on the Facts he proposes to prove in Support of his Action.—But though this is the regular Course, yet where there is Danger of losing Evidence, by Death or otherwise, the Court has sometimes been in use, even before the Action is called in Court, to allow Proofs to be taken, to lie *in retentis*, upon the Plaintiff's giving in a Condescendence or Particular of the Facts to be proved by him in the Cause, with a List of the Witnesses Names.—In the present Case the Plaintiffs, upon the 9th of December, two Days after they had executed their Summonses, petitioned the Court for an immediate Proof to lie *in retentis*; but as no Condescendence of Facts or of the Witnesses Names was exhibited, this Proof was refused.

9th December, 1762.

21st January 1763.

John Stewart's Ex-
amination, 14th, 15th,
and 16th of December,
1762.

Before this Question concerning the Proof to lie *in retentis*, was determined, the Plaintiffs made a second very irregular Application, without the Notices or Intimation required by the Rules of the Court, insisting for the immediate Examination of Sir John Stewart, the Appellant's Father, founded on an Allegation that he had an Intention of going abroad; and upon this Suggestion, the Court was prevailed on to grant an immediate Order for his Attendance.—Sir John, though labouring under a severe Indisposition, complied with the Order of the Court, and was examined for three Days successively in Presence of the whole Lords, on the 14th, 15th, and 16th of December 1762, upon Interrogatories formed by the Plaintiffs, relative to a great Variety of Facts which had happened fifteen Years before; and this Declaration having been taken, to lie *in retentis*, was sealed up by Order of the Court, not to be opened or used till the other Proofs should be regularly taken in the Cause.

The Dutches of Doug-
las goes to Paris in De-
cember 1762, and is
alleged that the Re-
ports which had been
spread by Mr. Stewart
were groundless.

17th of January, 1763.
Information of a criminal
action which had been
brought in the Tournelle
on the 16th of Decem-
ber preceding.

The Dutches of Douglas having gone to Paris about this Time, attended by some Persons of Business, to enquire into the Truth of Mr. Stewart's Averments, she could discover no Foundation for the Reports that had been propagated, and she rested for some Time in the most perfect Confidence, that it was impossible by fair Means to shake the Evidence of the Appellant's Legitimacy.—But upon the 17th of January, 1763, it was discovered that a Process had been for some Time pending before the Tournelle or Criminal Chamber of the Parliament of Paris, relative to this Affair.—Upon further Enquiry it was found, that many Witnesses had been secretly examined before the Tournelle, upon a *Plainte* exhibited by Sir Hew Dalrymple and Mr. Andrew Stewart, as Agent, and one of the Tutors of the Duke of Hamilton, against Sir John Stewart and Mrs. Helen Hewit, accusing them of the Crime of *Supposition of Children*.—This *Plainte* had been signed, and given in to the Parliament, upon the 16th of December.—A Variety of Witnesses had been examined upon it in Paris and elsewhere, Writings produced, Police Books founded on; and all this conducted with so much Secrecy, that though the Dutches of Douglas and her Assistants had been in Paris from the End of December, and some of them had more than once conversed with Mr. Stewart and Sir Hew Dalrymple, yet it was only by Accident that, upon the 17th of January 1763, they came to the Knowledge of this extraordinary Proceeding.

Plainte of the Tour-
nelle Process.

Had it been really true, that Sir John Stewart and Lady Jane had adopted two Foundlings in Paris as their Children, and thereby given those Children Pretensions on the Estates of Douglas and Grantully in Scotland, this could not be an Injury to any one in France, nor call upon the Justice of that Kingdom to punish the Contrivers of it, especially as neither their Persons nor their Fortunes were within the Reach of the Process of the Courts in that Kingdom. The ill Effects of such a Scheme was to be felt in Scotland only, and the Contrivers of it (if any such Scheme was contrived) were within the Reach of the Courts of Justice in Scotland. It was also well known, that the Lords of Session neither did nor could act upon any Evidence but such as was taken in their own Court, or by an Authority delegated from them. The Intention therefore, and the Purpose of this criminal Process in the Tournelle, must have been to prepare Witnesses to be afterwards examined under the Authority of the Court of Session; and to oblige the Persons examined in the Tournelle to stick to a Tale once told, whether true or false, as by varying from it they might incur at least the Infamy, if not the Punishment of Perjury.—It was with a View to this secret Process, that the Respondents had applied for and obtained Sir John Stewart's Declaration, without avowing the Purpose for which it was intended: And it appears that they actually used this Declaration in an additional *Plainte* given in by them to the Tournelle upon the fourth of January 1763, in which they stated a Variety of Facts, as asserted by Sir John, and prayed further Proofs in order to refute them, though they had no Right to make use of a Declaration, taken to lie *in retentis*, before it was opened by Authority of the Court.

Complaints made to the
Court of Session of the
Proceedings in France.
14th of February, 1763.

The Appellant's Council in Scotland, upon receiving the first Information of the Tournelle Process, immediately laid their Intelligence before the Court of Session, and complained of so irregular a Proceeding; and upon the 8th of February 1763, the Lords "ordained the Duke of Hamilton particularly to condescend on the Names of his Tutors, who authorized the Actions now depending, at the Instance of the Duke against Mr. Douglas the Defender; and also to confess or deny if the criminal Prosecution is carrying on at the Instance of Duke Hamilton and his Tutors against Sir John Stewart; and if such Prosecution is commenced, when the Authority for carrying it on was given by the Tutors, and when such Prosecution was actually commenced."—The Respondents, in Obedience to this Order, condescended on the Tutors Names, and acknowledged that on the 13th of December, 1762, they had signed a Commission to Mr. Andrew Stewart, authorizing him "to commence, raise, and continue all Processes and Actions competent before any of the Courts of Law at Paris, or any where else in France." That Mr. Andrew Stewart had, on the 16th December, without waiting for the Commission, in Conjunction with Sir Hew Dalrymple, signed their *Plainte* to the Parliament of Paris, but alledged that they could give no Sort of Information with regard to the Nature of that *Plainte*.

The Appellant's 2d
Petition, 8th March,
1763, complaining of
the Proceedings in
France.

The Appellant, upon the 8th of March 1763, gave in another Petition, setting forth the Proceedings in France, so far as they had come to his Knowledge, and praying, "That the Court would appoint Mr. John Davidson, the Agent for the Plaintiffs

" Plaintiffs in Scotland, immediately to lodge in the Clerk's Hands a Copy of the *Plainte* signed by Sir Hew Dalrymple and Mr. Andrew Stewart, on the 16th of December, 1762, and also a Copy of such Variations as had been made therein, and of the Procedure had thereon: 2do. To lay their Injunctions upon Sir Hew Dalrymple and Mr. Andrew Stewart, and the other Tutors of Duke Hamilton, not to go on further in these irregular Proceedings in France, under such Penalty as to their Lordships should seem just: And, lastly, to do what else should seem proper to their Lordships, to vindicate the Authority of the Court, and to protect the Petitioner against such injurious Proceedings." This Petition was appointed to be seen and answered against the Month of June then next.

Debate upon the Titles of the Duke of Hamilton and Lord Douglas Hamilton.

In the Month of June the Actions of Reduction of the Service were called in Court, and conjoined, and the first Question which occurred was the Title and Interest of the Plaintiffs to insist in these Actions. — The Appellant maintained, that the Duke of Hamilton had no legal Title or Interest to insist in a Reduction of his Service, as the Son of Lady Jane Douglas: For, as the Court had determined by their Interlocutor of the 9th of December 1762, that the Duke had no Claim to the Estate upon any of the Settlements, either ancient or modern; he had no more Right to object to the Appellant's Legitimacy than any other Stranger not connected with the Family of Douglas.

30th June, 1763. Interlocutor sustaining the Duke of Hamilton's Title, appealed from by the original Appeal. Condescendence or Particular of Facts given in by the Respondents.

On advising this Question, the Court of Session, by their Interlocutor, 30th of June 1763, " found that the Duke of Hamilton had a Title to insist in this Action, and remitted to the Lord Ordinary to proceed in the Cause accordingly.

The Plaintiffs soon after put in their Condescendence or Particular of Facts, consisting of sixty-one separate Articles, whereof the forty-three first Articles contain a Detail of Sir John and Lady Jane Stewart's Journey to Paris, with many Circumstances tending to raise a Suspicion, that Lady Jane could not have been delivered of Twins at the Time and Place mentioned in the Appellant's Service. — Eleven Articles contain a circumstantial Account of a Child carried off at Paris by one Duvernes, in November 1749, and endeavouring to shew that this applied to Sholto Douglas, the Appellant's Twin Brother. — The remaining Part of the Condescendence contains an Account of what passed after the Appellant's Parents returned to Britain.

The Lords of Session heard Council upon the Matters contained in the Condescendence; and the Appellant having particularly insisted, that the illegal Methods taken to prepossess the Witnesses examined in the *Tournelle* should be sustained as a total Objection to these Witnesses in the present Action, the Court appointed Informations on these Points.

Argument for the Appellant in his Information and Answer to the Respondent's Particular of Facts.

The Appellant's Information given into the Court, contains a general Answer to the Respondents Particular of Facts, stating a Summary of the Evidence taken before the Jury at the Appellant's Service, and shewing that the Particulars mentioned by the Respondents consisted of Conjectures and Inferences drawn from Facts, supposed to have happened fifteen Years before, and reported by Persons who had no particular Reason to attend to them, nor could be thought correct in their Remembrance of them; of Doubts and Presumptions arising from the Uncertainty of a Day or an Hour; of negative Evidence arising from particular Persons not observing Lady Jane's Pregnancy, and of the Improbability of her Delivery at the Age of fifty: That though the Facts, as stated by the Respondents, were to be admitted as true, yet they could have no Weight in Opposition to the clear and positive Evidence laid before the Jury at the Service: — That this Proof could be corroborated by many Witnesses, in every Particular; and the Appellant most readily agreed to go into further Proofs, so far as they could be conducted agreeable to the established Rules of Proceeding in Scotland. — The Appellant represented, that in a Cause of this Consequence, and where he was in all Events unquestionably innocent, and intitled to Favour and Protection, the Plaintiffs ought to have been particularly careful to proceed in a fair and legal Manner, and to take no undue Advantages. — That after having raised their Action in the Court of Session, the only Court competent for trying the Question, it was illegal, and derogatory from the Honour of that Court, to institute another Action in a foreign Court, which could have no other Tendency but to pre-engage the Witnesses, by a partial and private Examination, and fix them in a Tale which they could not afterwards recede from, when fairly and openly examined: — That the *Tournelle* Process had in many respects been attended with very great Inconveniencies to the Appellant; for not only were the Witnesses averse to give any Information to his Agents at Paris, after they had been examined in the *Tournelle*, but his Agents had been refused the Assistance of the Officers of Police, or Inspection of any of the Books, Records, or Writings, necessary for his Defence, most of them having been locked up in the *Tournelle*, and others in the Custody of the Officers of Police, who refused to shew them, assigning as a Reason that the Affair was *en Justice réglée*, although it was certain the Respondent's Agent had all Manner of Assistance from the Police, and had been directed in his Enquiries by one of their Officers: — That every secret or *ex parte* Examination of Witnesses was reprobated by the Law of Scotland, inasmuch that the Precognitions usually taken in criminal Cases, for informing the public Prosecutor, (and which could only be done before the Action was raised) were always destroyed when the Witnesses came to be examined in the Course of Trial: — That in the present Case, the Proceedings in the *Tournelle* were intended as a Preparation of the Evidence, to be used in a civil Question already depending, a Thing unknown in the Law of Scotland, and of the most dangerous Tendency: — That it was impossible to maintain, that this *Tournelle* Process could be intended for the fair and honest Purpose of convicting and punishing Sir John Stewart and Mrs. Hewit, who neither resided in France, nor were in any respect subjected to its Laws: — That at any Rate, it was improper to resort to a foreign Court, when the Plaintiffs might, with equal or greater Propriety, have tried the Delinquents in this Country, where they knew Sir John and Mrs. Hewit resided, and where alone the Injury was felt, and the Sentence could receive Execution; and the resorting in this Manner to a foreign Court was deemed illegal in Scotland, and was prohibited in England by the Statute 27th of Edward III.

It was further argued, That the Forms of Proceeding in the *Tournelle*, however adapted to the Genius and Constitution of the French Monarchy, were adverse to the Idea of British Liberty. For Trials were there carried on in the most secret Manner, and even the Party accused had no Opportunity of seeing, or putting a Question to the Witnesses, till they were fixed down by two different Examinations upon Oath: — That these Examinations were taken in Presence only of a Judge, delegated by the Court, and a Clerk; and in Place of putting Questions to the Witnesses, the Form was to read over the *Plainte*, containing such a Representation of Facts as the Prosecutor was pleased to give, and then to take down what the Witnesses deposed concerning the Matters therein contained: — That this was the Method pursued in the present Case; for a Variety of *Plaintes*, and Additions to *Plaintes*, had been given in by Mr. Stewart and Sir Hew Dalrymple, containing a partial and artful Narration of the Facts, and of the Arguments on which they endeavoured to rear up this System of an Imposture; a Number of Witnesses had been called and examined on Oath on these Facts, after hearing the *Plaintes* read over to them, in order to refresh their Memories; and all this conducted in the most secret and mysterious Manner, than which nothing could be more contrary to the fair and open Method of Trials, as practised in Great Britain: — That this *Tournelle* Proceeding was the more irregular, that even supposing the Facts charged to have been true, yet France was not in reality the *Locus delicti*: For there was no Crime in Sir John Stewart's adopting Children in France; no Person there was hurt by it; the Injury was committed against British Subjects: The Crime therefore consisted not in adopting the Children in France, but in producing them in Great Britain as Heirs to the Family of Douglas. — That therefore, in these Circumstances, it was more consonant to Justice, that the Party who committed the Wrong should be deprived of the Evidence of these Witnesses, than that the Appellant, who was certainly innocent, should suffer by such unfair Proceedings.

Argument for the Respondents in their Information.

The Respondents in their Information, endeavoured to account for the Proceedings before the *Tournelle* in two different Ways, inconsistent with each other. They at first seemed to acknowledge, that the sole Intention of it was to serve as a Precognition, and that they had no other View, " but to try the Affair, and preserve the Testimony of the Witnesses:" Afterwards they retracted this Admission, and insisted, that the *Tournelle* Proceeding was a fair and competent Action, intended for the Purpose of convicting Sir John Stewart and Mrs. Hewit; and that it was carried on according to the established Laws of France, in Criminal Matters; according to which, it was competent to try the Delinquents in the Place where the Crime was committed, and to proceed against them in Absence, though not cited or apprehended within the Territory. — That by the Law of Scotland, the Examination of a Witness, in a regular and judicial Manner, in one Action, afforded no Objection to his being afterwards examined, upon the same Facts, in a separate Action; and if his two Oaths were contradictory,

dictory, there was no Reason why he should not be prosecuted for Perjury.—And lastly, supposing there should be any Objection to the Witnesses examined in the *Tournelle*, this could not affect Lord Douglas Hamilton, who was no Party to these Proceedings, nor even the Duke of Hamilton, because he could not be hurt by the Act and Deed of his Tutors.

The Lords of Session, upon advising these Informations, upon the 27th of July 1763, pronounced the following Interlocutor: “Before Answer, allow the Pursuers (*i. e.* Respondents,) to prove the Facts contained in the Condescendances given in for them; and allow to the Defenders (*i. e.* Appellants,) a conjunct Probation, and both Parties to prove every other Fact and Circumstance which they may judge material in the Cause; and for that Effect, grant Commission to both Parties: Find the Objection, that certain Witnesses had been examined before the *Tournelle Criminelle* of the Parliament of Paris, not relevant to incapacitate those Witnesses from being examined as Witnesses in this Cause, reserving all Objections to their Credibility, when the Proof comes to be advised: But find that the Pursuers, before proceeding to execute the Commission now granted, must give in a Petition to the Parliament of Paris, praying, That the Depositions of the Witnesses taken, in consequence of the *Plaintes*, at the Instance of any of the Pursuers, may be delivered up to the Commissioner to be named by the Defenders, that these Depositions may be cancelled; and also praying, That Inspection be granted to the Defenders of the *Plaintes*, Records, or Writings produced therein, and whole Procedure had thereon, with Liberty to the Defenders to take Copies, Extracts, or Excerpts thereof: And in case the Depositions cannot be delivered up, find, the Pursuers must procure to the Defender, or his Agents at Paris, free Access to, and Inspection of, the *Plaintes*, Proofs, Books, Writings, and whole Procedure had in these *Plaintes*, before the *Tournelle Criminelle*; and Liberty to the Defenders, to take Copies, Extracts, or Excerpts thereof; and this at least fifteen Days before the Pursuers examine any Witness that has been adduced before the *Tournelle Criminelle*: And the Lords hereby discharge the Pursuers, upon their Peril, to examine any more Witnesses, or to give in any more *Plaintes*, relative to the Question in issue between the Parties in this Cause, before the *Tournelle Criminelle*, or any other Court in France, or to carry on any further Procedure, in the Prosecution of the said *Plaintes*, after the 10th of August next, and during the Dependence of this Cause: And find, That no Witnesses examined at the Instance of the Pursuers, before any Court in France, from and after the 10th Day of August next, shall be admitted as Witnesses in this Cause. Find, That the Pursuers must procure Inspection to the Defenders, or their Agent at Paris, of all such Letters to the Lieutenant-General, or other present Officers of the Police, relative to the Matters in issue between the Parties, as shall, between and the 15th Day of August next, be specially condescended on at Paris by the Defenders, or their said Agents, and as shall be extant at the Time; and also, of all Books and Registers of Police, or other Writings, relative to the Matters in issue between the Parties, which have been founded on by the Pursuers, or which have been, or may be communicated to them, and are in the Custody or Possession of the Lieutenant-General de Police, or other Officers of the Police, with Liberty to take Copies, or Extracts, or Excerpts from them, at least fifteen Days before any Witness can be examined for the Pursuers in France.”—The remaining Part of the Interlocutor directs the Form and Manner of executing the Commission.

The Court having, at the same Time, considered the Petition above-mentioned, of the 8th of March, with Answers thereto, for the Tutors of the Duke of Hamilton, and for John Davidson and Sir Hew Dalrymple, “superfeded advising thereof, until the Proof to be taken in the Cause is advised by the Court.”

The Appellant, on the 3d of August 1763, put in a reclaiming Petition, in which he informed the Court of a new and very extraordinary Step, lately taken by his Adversaries, in Paris, which was the publishing a *Monitoire* in all the Churches of that City, in a very unusual and improper Style, containing a full Narration of all the Facts alledged by them in this Cause, with Descriptions of Sir John and Lady Jane Stewart, and Mrs. Hewit, and treating the Imposture as already proved, or a Thing of which there could be no Doubt. This *Monitoire* was published by the Archbishop of Paris, in Consequence of an *Arrete* of Parliament, obtained at the Request of the *Procureur-General*; and all Persons were enjoined, under Pain of Excommunication, to reveal to their Parish *Curees*, whatever they knew concerning the Facts therein contained, or the taking away of Children at the Times therein mentioned; these Revelations to be sealed up, and transmitted to the Criminal Court or *Procureur-General*.—The Appellant complained of this injurious Publication, which seemed to be thrown out as a Lure, to catch the Attention of every miserable Creature in Paris, who had lost a Child about any of the Periods spoke of in the *Monitoire*; and likewise to create a general Prepossession in the Minds of the Witnesses, who, by signing their Declarations made before the *Curees*, were tied down to adhere to these Declarations, when read over to them upon their Re-examination, equally as any of the *Tournelle* Witnesses: It was therefore submitted to the Court, that this Proceeding, as well as the others formerly complained of, were highly improper and blameable; and the Appellant concluded with praying, “That their Lordships would alter their Interlocutor of the 27th of July, so far as to find, that the Witnesses examined before the *Tournelle*, were inhabile Witnesses in this Cause, and could not be examined for the Plaintiffs; but reserving to the Defendant to adduce them, if he should see Cause.—2do, To ordain the Plaintiffs to discharge the several *Plaintes* brought by them in the *Tournelle* in Paris, before any Proof can be allowed by this Court.—3tio, To alter their Interlocutor, declaring the Consideration of the Petition and Answers above-mentioned, concerning these *Plaintes*: And lastly, to find, that before any Proof should be taken in this Cause, the Petitioner should have Access to the Proofs taken at Rheims, or in England, or Scotland, upon the Commission of the Parliament of Paris, and to all Reports that had been, or should be made by the *Curees* to the Parliament or *Procureur-General*, in Consequence of the *Monitoire*.”

And in an additional Petition, 9th of August 1763, the Defender further prayed, “That if the Lords were not disposed, in *hoc Statu*, to reject altogether the Evidence of the Witnesses examined before the *Tournelle*, or by the *Curees*, they would supercede giving any final Determination upon that Point, till these Proceedings should be laid before them; or at least to find, that the French Witnesses could not be examined upon Commission, but must be brought from France to be examined in their Lordships Presence.”

The Court, on advising these Petitions and Answers, upon the 11th of August 1763, pronounced an Interlocutor, “Adhering to their former Interlocutor, with these Additions, That they appoint the Depositions of the Witnesses who have been examined before the *Tournelle*, to be sealed up separate from the Testimonies of the other Witnesses to be examined, and to transmit them so sealed up, not to be opened by either Party, without the Authority of this Court; reserving to the Defender, to object against these Examinations being made Part of the State: And find, that the Defender may examine any of the Witnesses that may have been examined before the *Tournelle*, whether the Pursuer shall have complied with the Conditions of this or the preceding Interlocutor in the Cause or not: And find, that the Pursuers must procure free Access to the Defenders, or their Agents, to the Proof taken at Rheims before the Commissioners of the Parliament of Paris; and also to any Proof that may have been taken in England or Scotland, and to all Reports that have or shall be made by the *Curees* to the Parliament or *Procureur-General*, in Consequence of the *Monitoire*, which the Pursuers have had Inspection of, or are possessed of; and if desired, shall join with the Defenders in any Application for getting Possession or Inspection of them.”

In Pursuance of these Interlocutors, some of the Council and Agents for both Parties repaired to France; and as Letters of *Pareatis*, or a Commission under the Great Seal of France, was necessary in this Case, to authorize the Commissioners to act, and to compel the Witnesses to appear, which they could not safely do, on account of the Action before the *Tournelle*, a joint Application was made by both Parties; and upon the 14th of September 1763, the *Pareatis* was granted, and by mutual Consent, was lodged in the Hands of Monsieur D’Anjou, the Respondents *Procureur* or Agent, until the Proofs should be taken.

When the Appellants Council expected the Proofs were to begin, they learned, on the 3d of October, that 14 Days before that Time, Mr Stewart, the Respondents Agent, had, without their Knowledge or Consent, delivered to the Chancellor the *Pareatis*, which, by Consent of Parties, had been lodged in the Hands of Monsieur D’Anjou, for the Behoof of all concerned; and this was industriously concealed from the Appellant’s Council, who had frequently Opportunities of seeing Mr. Stewart during that Period.

"Plaintiffs in Scotland, immediately to lodge in the Clerk's Hands a Copy of the *Plainte* signed by Sir Hew Dalrymple, and Mr. Andrew Stewart, on the 16th of December, 1762, and also a Copy of such Variations as had been made therein, and of the Procedure had thereon: *2do.* To lay their Injunctions upon Sir Hew Dalrymple and Mr. Andrew Stewart, and the other Tutors of Duke Hamilton, not to go on further in these irregular Proceedings in France, under such Penalty as to their Lordships should seem just: And, lastly, to do what else should seem proper to their Lordships, to vindicate the Authority of the Court, and to protect the Petitioner against such injurious Proceedings." This Petition was appointed to be seen and answered against the Month of June then next.

Debate upon the Titles of the Duke of Hamilton and Lord Douglas Hamilton.

In the Month of June the Actions of Reduction of the Service were called in Court, and conjoined, and the first Question which occurred was the Title and Interest of the Plaintiffs to insist in these Actions. — The Appellant maintained, that the Duke of Hamilton had no legal Title or Interest to insist in a Reduction of his Service, as the Son of Lady Jane Douglas: For, as the Court had determined by their Interlocutor of the 9th of December 1762, that the Duke had no Claim to the Estate upon any of the Settlements, either antient or modern; he had no more Right to object to the Appellant's Legitimacy than any other Stranger not connected with the Family of Douglas.

30th June, 1763. Interlocutor sustaining the Duke of Hamilton's Title, appealed from by the original Appeal. Condescendence or Particular of Facts given in by the Respondents.

On advising this Question, the Court of Session, by their Interlocutor, 30th of June 1763, "found that the Duke of Hamilton had a Title to insist in this Action, and remitted to the Lord Ordinary to proceed in the Cause accordingly.

The Plaintiffs soon after put in their Condescendence or Particular of Facts, consisting of sixty-one separate Articles, whereof the forty-three first Articles contain a Detail of Sir John and Lady Jane Stewart's Journey to Paris, with many Circumstances tending to raise a Suspicion, that Lady Jane could not have been delivered of Twins at the Time and Place mentioned in the Appellant's Service. — Eleven Articles contain a circumstantial Account of a Child carried off at Paris by one Duvernes, in November 1749, and endeavouring to shew that this applied to Sholto Douglas, the Appellant's Twin Brother. — The remaining Part of the Condescendence contains an Account of what passed after the Appellant's Parents returned to Britain.

The Lords of Session heard Council upon the Matters contained in the Condescendence; and the Appellant having particularly insisted, that the illegal Methods taken to prepossess the Witnesses examined in the *Tournelle* should be sustained as a total Objection to these Witnesses in the present Action, the Court appointed Informations on these Points.

Argument for the Appellant in his Information and Answer to the Respondent's Particular of Facts.

The Appellant's Information given into the Court, contains a general Answer to the Respondents Particular of Facts, stating a Summary of the Evidence taken before the Jury at the Appellant's Service, and shewing that the Particulars mentioned by the Respondents consisted of Conjectures and Inferences drawn from Facts, supposed to have happened fifteen Years before, and reported by Persons who had no particular Reason to attend to them, nor could be thought correct in their Remembrance of them; of Doubts and Presumptions arising from the Uncertainty of a Day or an Hour; of negative Evidence arising from particular Persons not observing Lady Jane's Pregnancy, and of the Improbability of her Delivery at the Age of fifty: That though the Facts, as stated by the Respondents, were to be admitted as true, yet they could have no Weight in Opposition to the clear and positive Evidence laid before the Jury at the Service: — That this Proof could be corroborated by many Witnesses, in every Particular; and the Appellant most readily agreed to go into further Proofs, so far as they could be conducted agreeable to the established Rules of Proceeding in Scotland. — The Appellant represented, that in a Cause of this Consequence, and where he was in all Events unquestionably innocent, and intitled to Favour and Protection, the Plaintiffs ought to have been particularly careful to proceed in a fair and legal Manner, and to take no undue Advantages. — That after having raised their Action in the Court of Session, the only Court competent for trying the Question, it was illegal, and derogatory from the Honour of that Court, to institute another Action in a foreign Court, which could have no other Tendency but to pre-engage the Witnesses, by a partial and private Examination, and fix them in a Tale which they could not afterwards recede from, when fairly and openly examined: — That the *Tournelle* Process had in many respects been attended with very great Inconveniencies to the Appellant; for not only were the Witnesses averse to give any Information to his Agents at Paris, after they had been examined in the *Tournelle*, but his Agents had been refused the Assistance of the Officers of Police, or Inspection of any of the Books, Records, or Writings, necessary for his Defence, most of them having been locked up in the *Tournelle*, and others in the Custody of the Officers of Police, who refused to shew them, assigning as a Reason that the Affair was *en Justice réglée*, although it was certain the Respondent's Agent had all Manner of Assistance from the Police; and had been directed in his Enquiries by one of their Officers: — That every secret or *ex parte* Examination of Witnesses was reprobated by the Law of Scotland, inasmuch that the Precognitions usually taken in criminal Cases, for informing the public Prosecutor, (and which could only be done before the Action was raised) were always destroyed when the Witnesses came to be examined in the Course of Trial: — That in the present Case, the Proceedings in the *Tournelle* were intended as a Preparation of the Evidence, to be used in a civil Question already depending, a Thing unknown in the Law of Scotland, and of the most dangerous Tendency: — That it was impossible to maintain, that this *Tournelle* Process could be intended for the fair and honest Purpose of convicting and punishing Sir John Stewart and Mrs. Hewit, who neither resided in France, nor were in any respect subjected to its Laws: — That at any Rate, it was improper to resort to a foreign Court, when the Plaintiffs might, with equal or greater Propriety, have tried the Delinquents in this Country, where they knew Sir John and Mrs. Hewit resided, and where alone the Injury was felt, and the Sentence could receive Execution; and the resorting in this Manner to a foreign Court was deemed illegal in Scotland, and was prohibited in England by the Statute 27th of Edward III.

It was further argued, That the Forms of Proceeding in the *Tournelle*, however adapted to the Genius and Constitution of the French Monarchy, were adverse to the Idea of British Liberty. For Trials were there carried on in the most secret Manner, and even the Party accused had no Opportunity of seeing, or putting a Question to the Witnesses, till they were fixed down by two different Examinations upon Oath: — That these Examinations were taken in Presence only of a Judge, delegated by the Court, and a Clerk; and in Place of putting Questions to the Witnesses, the Form was to read over the *Plainte*, containing such a Representation of Facts as the Prosecutor was pleased to give, and then to take down what the Witnesses deposed concerning the Matters therein contained: — That this was the Method pursued in the present Case; for a Variety of *Plaintes*, and Additions to *Plaintes*, had been given in by Mr. Stewart and Sir Hew Dalrymple, containing a partial and artful Narration of the Facts, and of the Arguments on which they endeavoured to rear up this System of an Imposture; a Number of Witnesses had been called and examined on Oath on these Facts, after hearing the *Plaintes* read over to them, in order to refresh their Memories; and all this conducted in the most secret and mysterious Manner, than which nothing could be more contrary to the fair and open Method of Trials, as practised in Great Britain: — That this *Tournelle* Proceeding was the more irregular, that even supposing the Facts charged to have been true, yet France was not in reality the *Locus delicti*: For there was no Crime in Sir John Stewart's adopting Children in France; no Person there was hurt by it; the Injury was committed against British Subjects: The Crime therefore consisted not in adopting the Children in France, but in producing them in Great Britain as Heirs to the Family of Douglas. — That therefore, in these Circumstances, it was more consonant to Justice, that the Party who committed the Wrong should be deprived of the Evidence of these Witnesses, than that the Appellant, who was certainly innocent, should suffer by such unfair Proceedings.

Argument for the Respondents in their Information.

The Respondents in their Information, endeavoured to account for the Proceedings before the *Tournelle* in two different Ways, inconsistent with each other. They at first seemed to acknowledge, that the sole Intention of it was to serve as a Precognition, and that they had no other View, "but to try the Affair, and preserve the Testimony of the Witnesses:" Afterwards they retracted this Admission, and insisted, that the *Tournelle* Proceeding was a fair and competent Action, intended for the Purpose of convicting Sir John Stewart and Mrs. Hewit; and that it was carried on according to the established Laws of France, in Criminal Matters; according to which, it was competent to try the Delinquents in the Place where the Crime was committed, and to proceed against them in Absence, though not cited or apprehended within the Territory. — That by the Law of Scotland, the Examination of a Witness, in a regular and judicial Manner, in one Action, afforded no Objection to his being afterwards examined, upon the same Facts, in a separate Action; and if his two Oaths were contradictory,

dictory, there was no Reason why he should not be prosecuted for Perjury.—And lastly, supposing there should be any Objection to the Witnesses examined in the *Tournelle*, this could not affect Lord Douglas Hamilton, who was no Party to these Proceedings, nor even the Duke of Hamilton, because he could not be hurt by the Act and Deed of his Tutors.

The Lords of Session, upon advising these Informations, upon the 27th of July 1763, pronounced the following Interlocutor: “Before Answer, allow the Pursuers (*i. e.* Respondents,) to prove the Facts contained in the Confessions given in for them; and allow to the Defenders (*i. e.* Appellants,) a conjunct Probation, and both Parties to prove every other Fact and Circumstance which they may judge material in the Cause; and for that Effect, grant Commission to both Parties: Find the Objection, that certain Witnesses had been examined before the *Tournelle Criminelle* of the Parliament of Paris, not relevant to incapacitate those Witnesses from being examined as Witnesses in this Cause, reserving all Objections to their Credibility, when the Proof comes to be advised: But find that the Pursuers, before proceeding to execute the Commission now granted, must give in a Petition to the Parliament of Paris, praying, That the Depositions of the Witnesses taken, in consequence of the *Plaintes*, at the Instance of any of the Pursuers, may be delivered up to the Commissioner to be named by the Defenders, that these Depositions may be cancelled; and also praying, That Inspection be granted to the Defenders of the *Plaintes*, Records, or Writings produced therein, and whole Procedure had thereon, with Liberty to the Defenders to take Copies, Extracts, or Excerpts thereof: And in case the Depositions cannot be delivered up, find, the Pursuers must procure to the Defender, or his Agents at Paris, free Access to, and Inspection of, the *Plaintes*, Proofs, Books, Writings, and whole Procedure had in these *Plaintes*, before the *Tournelle Criminelle*; and Liberty to the Defenders, to take Copies, Extracts, or Excerpts thereof; and this at least fifteen Days before the Pursuers examine any Witness that has been adduced before the *Tournelle Criminelle*: And the Lords hereby discharge the Pursuers, upon their Peril, to examine any more Witnesses, or to give in any more *Plaintes*, relative to the Question in issue between the Parties in this Cause, before the *Tournelle Criminelle*, or any other Court in France, or to carry on any further Procedure, in the Prosecution of the said *Plaintes*, after the 10th of August next, and during the Dependence of this Cause: And find, That no Witnesses examined at the Instance of the Pursuers, before any Court in France, from and after the 10th Day of August next, shall be admitted as Witnesses in this Cause. Find, That the Pursuers must procure Inspection to the Defenders, or their Agent at Paris, of all such Letters to the Lieutenant-General, or other present Officers of the Police, relative to the Matters in issue between the Parties, as shall, between and the 15th Day of August next, be specially condemned on at Paris by the Defenders, or their said Agents, and as shall be extant at the Time; and also, of all Books and Registers of Police, or other Writings, relative to the Matters in issue between the Parties, which have been founded on by the Pursuers, or which have been, or may be communicated to them, and are in the Custody or Possession of the Lieutenant-General de Police, or other Officers of the Police, with Liberty to take Copies, or Extracts, or Excerpts from them, at least fifteen Days before any Witness can be examined for the Pursuers in France.”—The remaining Part of the Interlocutor directs the Form and Manner of executing the Commission.

The Court having, at the same Time, considered the Petition above-mentioned, of the 8th of March, with Answers thereto, for the Tutors of the Duke of Hamilton, and for John Davidson and Sir Hew Dalrymple, “superfeded advising thereof, until the Proof to be taken in the Cause is advised by the Court.”

The Appellant, on the 3d of August 1763, put in a reclaiming Petition, in which he informed the Court of a new and very extraordinary Step, lately taken by his Adversaries, in Paris, which was the publishing a *Monitoire* in all the Churches of that City, in a very unusual and improper Style, containing a full Narration of all the Facts alledged by them in this Cause, with Descriptions of Sir John and Lady Jane Stewart, and Mrs. Hewit, and treating the Imposition as already proved, or a Thing of which there could be no Doubt. This *Monitoire* was published by the Archbishop of Paris, in Consequence of an *Arrete* of Parliament, obtained at the Request of the *Procureur-General*; and all Persons were enjoined, under Pain of Excommunication, to reveal to their Parish *Cureés*, whatever they knew concerning the Facts therein contained, or the taking away of Children at the Times therein mentioned; these Revelations to be sealed up, and transmitted to the Criminal Court or *Procureur-General*.—The Appellant complained of this injurious Publication, which seemed to be thrown out as a Lure, to catch the Attention of every miserable Creature in Paris, who had lost a Child about any of the Periods spoke of in the *Monitoire*; and likewise to create a general Prepossession in the Minds of the Witnesses, who, by signing their Declarations made before the *Cureés*, were tied down to adhere to these Declarations, when read over to them upon their Re-examination, equally as any of the *Tournelle* Witnesses: It was therefore submitted to the Court, that this Proceeding, as well as the others formerly complained of, were highly improper and blameable; and the Appellant concluded with praying, “That their Lordships would alter their Interlocutor of the 27th of July, so far as to find, that the Witnesses examined before the *Tournelle*, were inhabile Witnesses in this Cause, and could not be examined for the Plaintiffs; but reserving to the Defendant to adduce them, if he should see Cause.—2do, To ordain the Plaintiffs to discharge the several *Plaintes* brought by them in the *Tournelle* in Paris, before any Proof can be allowed by this Court.—3tio, To alter their Interlocutor, delaying the Consideration of the Petition and Answers above-mentioned, concerning these *Plaintes*: And lastly, to find, that before any Proof should be taken in this Cause, the Petitioner should have Access to the Proofs taken at Rheims, or in England, or Scotland, upon the Commission of the Parliament of Paris, and to all Reports that had been, or should be made by the *Cureés* to the Parliament or *Procureur-General*, in Consequence of the *Monitoire*.”

And in an additional Petition, 9th of August 1763, the Defender further prayed, “That if the Lords were not disposed, *in hoc Statu*, to reject altogether the Evidence of the Witnesses examined before the *Tournelle*, or by the *Cureés*, they would supercede giving any final Determination upon that Point, till these Proceedings should be laid before them; or at least to find, that the French Witnesses could not be examined upon Commission, but must be brought from France to be examined in their Lordships Presence.”

The Court, on advising these Petitions and Answers, upon the 11th of August 1763, pronounced an Interlocutor, “Adhering to their former Interlocutor, with these Additions, That they appoint the Depositions of the Witnesses who have been examined before the *Tournelle*, to be sealed up separate from the Testimonies of the other Witnesses to be examined, and to transmit them so sealed up, not to be opened by either Party, without the Authority of this Court; reserving to the Defender, to object against these Examinations being made Part of the State: And find, that the Defender may examine any of the Witnesses that may have been examined before the *Tournelle*, whether the Pursuer shall have complied with the Conditions of this or the preceding Interlocutor in the Cause or not: And find, that the Pursuers must procure free Access to the Defenders, or their Agents, to the Proof taken at Rheims before the Commissioners of the Parliament of Paris; and also to any Proof that may have been taken in England or Scotland, and to all Reports that have or shall be made by the *Cureés* to the Parliament or *Procureur-General*, in Consequence of the *Monitoire*, which the Pursuers have had Inspection of, or are possessed of; and if desired, shall join with the Defenders in any Application for getting Possession or Inspection of them.”

In Pursuance of these Interlocutors, some of the Council and Agents for both Parties repaired to France; and as Letters of *Pareatis*, or a Commission under the Great Seal of France, was necessary in this Case, to authorize the Commissioners to act, and to compel the Witnesses to appear, which they could not safely do, on account of the Action before the *Tournelle*, a joint Application was made by both Parties; and upon the 14th of September 1763, the *Pareatis* was granted, and by mutual Consent, was lodged in the Hands of Monsieur D'Anjou, the Respondents *Procureur* or Agent, until the Proofs should be taken.

When the Appellants Council expected the Proofs were to begin, they learned, on the 3d of October, that 14 Days before that Time, Mr Stewart, the Respondents Agent, had, without their Knowledge or Consent, delivered to the Chancellor the *Pareatis*, which, by Consent of Parties, had been lodged in the Hands of Monsieur D'Anjou, for the Behoof of all concerned; and this was indolently concealed from the Appellant's Council, who had frequently Opportunities of seeing Mr. Stewart during that Period.

In seeming Compliance with the Judgment of the Court of Session, Mr. Stewart had, on the 13th of *August*, presented a *Requette*, in a very declamatory Style, to the *Tournelle*, praying Cancellation or Inspection of the Proofs taken before that Court.—The Judges of the *Tournelle* having remitted the Parties to the King, another *Requette* was presented by Mr. Stewart, upon the 12th of *September*, to the King and Council; a third *Requette* was presented on the 26th of *September*, and a fourth upon the 24th of *October*; but in all these the Facts were partially stated, Difficulties were suggested, and the whole represented in such a View, as shewed no Desire in the Respondents to comply with the Injunctions of the Court of Session, but on the contrary, to continue the Proceedings before the *Tournelle*.

The Appellants Council likewise presented a *Requette* to the King and Council, praying Communication of the Proofs taken before the *Tournelle*, and likewise Cancellation.

28th October, 1763.
Arrete of the French King upon the several *Requettes* presented by the Parties.

Upon these different *Requettes*, an *Arrete* was pronounced by the King and Council, upon the 28th of *October*, suppressing the former *Paratis*, and ordaining the Criminal Action before the *Tournelle* to be carried on to the final Determination and Execution; and that then, the Clerk should transmit a Copy of the Proceedings to the Clerk of the Court of Session, to serve for such Use as that Court should judge proper; and lastly, granting a new Commission to French Council to execute the Commission of the Court of Session, for taking the Proofs by Witnesses.

Variations in this Arrete from the Commission of the Court of Session.

By this *Arrete*, the Commission of the Court of Session was altered in the following material Points: 1^{mo}, The Lords of Session had discharged the Respondents, at their Peril, to proceed in the *Tournelle* Prosecution.—The *Arrete* of the French King, on the contrary, ordains that Prosecution to be carried on; and this Order, being in general Terms, must mean that it is to be carried on as from the Beginning, at the Instance and upon the Expence of the private Prosecutors, with the Name only of the Procureur-General to authorize their Proceeding.—2^{do}, By the Decree and Commission of the Court of Session, the Respondents were obliged, either to procure a total Cancellation of the *Tournelle* Depositions, or at least a full Communication of them: The *Arrete* has absolutely refused both these Alternatives. And lastly, by this *Arrete* all the *British*, and Part of the French Commissioners, are struck out, and the Cause thrown entirely into the Hands of certain French Lawyers.

Appellants Council leave Paris, and apply to the Court of Session, upon the 1st of December, 1763, to stop Procedure on the Commission, as altered by the *Arrete*.

The Appellants Council were of Opinion, they could not proceed to take the Proofs in the Manner directed by this *Arrete*; and therefore, after taking a Protest against Mr. Stewart, they left Paris and returned to Scotland, where they laid the whole Proceedings before the Court of Session, in a Petition dated 1st of December 1763, and prayed the Court to find, "That there could be no Procedure within the Dominions of France, upon the Commission of the Court of Session, as new-modelled by the French King's *Arrete*, and immediately to discharge the Pursuers, and Mr. Andrew Stewart, their Agent, from proceeding to examine any Witnesses, upon their Peril; and to give such other Redress, as to their Lordships should seem proper." This Petition was ordained to be seen and answered; and the 20th of December having been appointed for advising the Petition and Answers, the Lords, on the 9th of that Month, pronounced an Interdict, discharging the Respondents to begin the taking of their Proof until the Question should be advised.

17th December, 1763.
Additional Petition for the Appellant, complaining of the Irregularity of the *Tournelle* Process.

Another Petition was put in for the Appellant, on the 17th of December 1763, insisting, That the Criminal Action was in every Respect illegal and incompetent; and more particularly in this, that supposing France to have been the Place where the alleged Crime was committed, yet it was altogether unknown in the Law and Practice of any Nation, that an Action could be carried on in Absence, *ratione delicti*, against a Stranger not cited within the Country; the Appellant therefore prayed, That the Court would resume the Consideration of the Petition 8th of March 1762, and 1^{mo}, "To appoint the Respondents, or their Agents, immediately to lodge in the Clerk's Hands, Copies of the *Plaintes* given in by them to the *Tournelle* at Paris, and of the written Pieces of Evidence produced by them in that Court.—2^{do}, To find, it was irregular in the Duke of Hamilton and his Tutors, and Sir Hew Dalrymple, to give in these *Plaintes*, or insist in that Action, and that the said Action was improper, illegal, and incompetent.—3^{tio}, To ordain them to discharge that Process, as far as in their Power, by a Writing under their Hands.—4^{to}, To find the Duke of Hamilton and his Tutors, and Sir Hew Dalrymple, conjunctly and severally, liable to the Petitioner in the Expences incurred in Consequence of it: And lastly, to do whatever should seem proper, to vindicate the Authority of the Court, and protect the Petitioner against such injurious Proceedings."

The Respondents Petition, praying to be released from the Conditions in the Commission from the Court of Session.

3d December, 1763.
The Appellant's Answer to this Petition.

The Respondents, on the other Hand, put in a Petition, upon the 3d of December 1763, wherein they alledged, they had done every Thing in their Power to comply with the Conditions imposed on them by the Court, but that the Laws and Ordinances of France stood in the Way; and therefore praying, "That the Act and Commission might be renewed, without any of the Conditions annexed to the former Commission, and which were now found to be impracticable." To this, it was answered, 1^{mo}, That in Fact they had not done every Thing in their Power to obtain a Compliance with these Conditions, but on the contrary, had made their Applications to the *Tournelle*, and to the King, in such a Way, as rather to prevent the Performance of them; and that they had declined to put in Practice, an easy and obvious Expedient to put an End to every Difficulty, which was to disclaim and pass from the *Tournelle* Action.—2^{do}, That supposing they had used every possible Means to obtain a Compliance with the Conditions imposed by the Court of Session, yet these Conditions ought not to be relaxed, because no Party can justly complain of a Hardship arising from his own Fault, and which cannot be removed without Injustice to another Party, who is undoubtedly blameless.—That besides, their own French Council had even given it as their Opinion, in the most express Manner, and supported by many Arguments and Authorities, in a Paper intitled *Memoire & Consultation*, published in their Name, That by the Law of Nations, Commissions for taking Proofs in a foreign Country ought to be executed according to the Laws of that Country where the Cause depends, and according to the Regulations and Conditions imposed by the Judge who issues the Commission.

21st December, 1763.
5th Interlocutor appealed from by both Parties.

The Court of Session, upon considering these various Applications, on the 21st of December 1763, pronounced the following Interlocutor: "The Lords having resumed Consideration of the Petition of Archibald Douglas of Douglas, dated the 1st Instant, with Answers thereto for Duke Hamilton and others, and Replies for Archibald Douglas; also the Petition for the Duke of Hamilton and others, dated the 3d Instant, with Answers thereto for Archibald Douglas, together with the Petition of Archibald Douglas on the 17th Instant; they remove the Interdict pronounced upon the 9th Instant, and allow the Proof upon the Act and Commission formerly granted, to proceed with, and under the Conditions therein contained, after the Intimation of this Interlocutor to Alexander M'Connochie, Writer in Edinburgh, or to any of the Defenders Lawyers at Paris, formerly authorized to act as Commissioners in taking the Proof in this Cause, or to any other known Agents or Doers for the Defender at Paris; such Intimation being always made to the said Alexander M'Connochie, Lawyers or Agents personally, or by leaving a Copy hereof at any of their respective Dwelling-Houses, fourteen Days preceding the Examination of any Witness, without Prejudice to the Parties, taking the necessary preparatory Steps before the actual Examination, immediately after said Intimation;—but with this further Explanation, that before proceeding to the Examination of any Witnesses who have already been, or shall hereafter be examined, in the *Tournelle Criminelle* of the Parliament of Paris, either at the Instance of the Procureur-General, or at the Instance of the Pursuers, the Pursuers shall be obliged to comply with the Conditions contained in the former Commission. And ordain the Pursuers and their Doers, betwixt and the first Day of January next, to produce, in the Hands of the Clerk to this Process, Copies of the whole *Plaintes* given in by Sir Hew Dalrymple, and in Name of the Duke of Hamilton and his Tutors, or either of them, to the *Tournelle Criminelle* of Paris, on or since the 16th Day of December 1762: And appoint the Clerk of this Court, to furnish the Pursuers with an Extract of this Judgment, to enable them to make due Intimation thereof in Manner above set forth; and for that Effect dispense with the reading hereof in the Minute Book: And with Respect to the whole other Points of the foresaid three Petitions, they refuse the Desire thereof."

The Respondents Petition for an Exhibition of all Writings in the Appellants Agent's Hands.

The Respondents having, upon the 9th of December, given in a Petition to the Court, representing, That several Writings, in the Custody of Mr. Beadle and Mr. Grinley, with whom Sir John Stewart and Lady Jane Douglas had lodged while at London,

don, the Writings left by Lady Jane, in the Hands of Mr. Lindsay, and a Bond granted by Lady Jane to the Earl of Morton, had all been transmitted to Mr. Charles Brown, the Appellants and Sir John Stewart's Agent; and praying Exhibition upon Oath, of these Writings. Answers were made by the Appellant to this Petition, showing, that an Exhibition of all Writings in general, was contrary to the established Law and Usage of Scotland; and that the Bond by Lady Jane to the Earl of Morton, was lodged in the publick Records, where the Respondents could have Access to it. The Lords, upon the 21st Day of December 1763, pronounced the following Interlocutor: "In respect the Bond by Lady Jane Douglas to the Earl of Morton is on Record, they refuse the Desire of this Petition."

Upon the 22d of Dec. 1763, another Petition was put in for the Appellant, occasioned by an Ambiguity in the Interlocutors of the 27th of July, and 11th of August 1763: This Petition prayed their Lordships, "To explain these Interlocutors in such Manner, as that the Conditions imposed with regard to the Witnesses that have been examined in the *Tournelle*, might be extended to all Witnesses who had revealed or declared to the Curés, and whose Revelations had been transmitted to the Procureur General, or lodged in the *Tournelle*; and in Case the Petition should be ordered to be answered, to grant an Interdict, prohibiting and discharging the Pursuers from proceeding in taking their Proofs, until Judgment was given upon this Petition; which further prayed, That the Appellant might be authorized to examine Witnesses at *Vienna*, in Manner therein mentioned."

The Court having advised this Petition, upon the 24th of December last, "Granted Commission for examining the Witnesses at *Vienna*, as prayed for; and refused the whole other Points in this Petition."

The Appellant has brought his Appeal to your Lordships from the Interlocutors, and Parts of the Interlocutors of the Court of Session before recited, viz. from the Interlocutor of the 30th of June 1763, sustaining the Title of the Duke of Hamilton: The Interlocutor of the 27th of July 1763, in so far as it finds the Objection to the Witnesses examined before the *Tournelle Criminelle*, not relevant to incapacitate these Witnesses from being again examined in this Cause; and in so far as it does not make the Cancellation of their Evidence an absolute Condition upon the Plaintiffs, in case these Witnesses shall be re-examined: —The other Interlocutor of the 27th of July 1763, superseding the Consideration of the Petition of the 8th of March 1763: —The Interlocutor of the 11th of August, in so far as it adheres to the former Interlocutor in the Points complained of, and as it only appoints the Depositions of the Witnesses examined before the *Tournelle* to be sealed up, and transmitted, in Manner therein mentioned, to the Court of Session, and only requires the Respondents to procure Access to the Appellant or his Agents, to the Proofs taken by Commission from the *Tournelle* of Paris, and to the Reports made by the Curés to the Procureur General, in consequence of the Monitoire; and to join with the Appellant, if desired, in any Application for getting Possession or Inspection of them, in Place of wholly setting aside these Witnesses, or at least requiring Cancellation of their Evidence as an absolute Condition; and in so far also, as this Interlocutor does not grant the Desire of the Petitions of 3d and 9th of August 1763, in the several Particulars therein prayed for: —The Interlocutor of 21st of December 1763, in so far as it removes the Interdict, and allows the Proof, upon the Act and Commission formerly granted, to proceed under the Conditions therein contained; and in so far as it only obliges the Pursuers to comply with the Conditions contained in the former Act and Commission, without incapacitating the Witnesses examined in the *Tournelle*, or at least requiring Cancellation of their Evidence; and in so far as it refused the Desire of the Petitions 1st and 17th of December last, in the several Particulars therein prayed for: And lastly, the Interlocutor of the 24th of December 1763, in so far as it adheres to any of the former Interlocutors in the Points above complained of, and refuses the Desire of the Petition of Date the 22d of December 1763. And the Appellant humbly hopes, That these Interlocutors, so far as complained of by the original Appeal, will be reversed, varied or altered, and that such Relief will be given to him as is prayed for by his said Appeal, for the following, among other

R E A S O N S.

- I. The Interlocutor of the 30th of June 1763, which supports a Right in the Duke of Hamilton to be a Pursuer or Plaintiff in this Cause, is appealed from, because, it is apprehended, he can have no Interest which can be a Foundation of such a Right. —It having been already determined, that he has no Interest under any of the Family Settlements now subsisting; he therefore can have nothing but a very remote Possibility of succeeding, as *Heir Male whatsoever* of the late Duke of Douglas, upon the Extinction of many Families who are called preferably to him; nor can any Suit, in relation to the Estate, be now instituted, to which the Duke of Hamilton could be deemed a necessary Party; wherefore, at present he is rather a *Maintainer* than a Party interested in the Suit, which ought not to be allowed.
- II. The principal Question on these Parts of the Interlocutors of the 27th of July, 11th of August, and 21st of December, 1763, and the other Interlocutors which adhere to them, appealed from by the original Appeal, relates to the Witnesses proposed by the Respondents, to be examined under the Commission issued by the Court of Session in this Cause. —After the Appellant had been served Heir to the Duke of Douglas, and after the Respondents had commenced a Process to reduce that Service, whereby the Court of Session was in Possession of the Cause, they commenced a criminal Action in the *Tournelle* at Paris against Sir John Stewart and Mrs. Hewit, which was most industriously concealed from the Appellants Agents, until many Witnesses had been examined by the Judge of the *Tournelle*. —The manifest Purpose of this Action was to fix and pre-occupy the Witnesses by a private and *ex parte* Examination. —The Action itself was incompetent in France, as the Parties accused were not Natives, or had any Estate or Place of Residence in that Kingdom, so that no Judgment pronounced against them could have any Effect; the Duke of Hamilton, or Sir Hew Dalrymple, the Plaintiffs, had no Interest in it, nor was the public Interest of France in any Degree concerned, as it was not alledged that the Parties accused had, by Violence or Stealth, carried away any Child from Paris, or had committed any Crime to be the Object of a public Prosecution. —The Appellant therefore most humbly insists, that the suspicious Examination of Witnesses, begun, and carried on in Contempt of the supreme Court, where the Rights of the Parties were then depending, and could only be tried, ought, by the Law and Usage of Scotland, to disqualify the Witnesses from giving Evidence in the present Action, as not being now at Liberty to give an impartial Testimony, because they lye under the Restraint of that Examination from which they cannot recede, without incurring at least the Infamy, if not the Punishment, of Perjury.
- III. The Revelations made to the Curés, in consequence of the *Monitoire*, which tended to lead the Vulgar in an extraordinary Manner, and which have been signed by the Relators, and are now transmitted, and make a Part of the Proceedings before the *Tournelle*, put them under the same Prejudices as the Witnesses examined in the *Tournelle*, and should for the same Reasons render them incompetent. While the Danger of Excommunication hung over them, it had the same Force to keep them fixed in the Tale they once told, as the Dread of the Punishment of Perjury had upon the *Tournelle* Witnesses.
- IV. Supposing, but not admitting, that the Witnesses who have been examined before the *Tournelle*, or have revealed to the Curés, are not entirely disqualified, yet under all the Circumstances of the present Case, they can

can now only be properly examined before the Lords of Session, who will be able to judge of their Prepossessions, and determine both as to their Competency and Credibility.—Commissions for examining Witnesses are only granted by the Court *ex gratia*, and are in many Cases refused where there is any Suspicion of the Character of the Witnesses, or the undue Practices of the Parties concerned.—The Conduct of the Respondents in the present Case does not entitle them to any Favour, nor can they justly complain of being deprived of the Benefit of a Commission, which, by their own irregular Conduct, cannot now be granted without manifest Prejudice to the Appellant.

- V. The Commission, which has been issued in the present Case by the Court of Session, is so entirely varied and new-modelled by the *Arrete* of the *French King*, that it remains no longer the Commission of that Court.—The Inspection of the *Tournelle* Evidence, which is made a preliminary Condition by the Court of Session, is absolutely refused; the criminal Action, in which the Respondents are forbid to insist, is ordered to proceed; and the *British* Commissioners named by the Court of Session are excluded; and four *French* Commissioners are now only allowed to execute this Commission on the Part of the Appellant.—It is manifest no Proof can proceed on these Terms, without the greatest Disadvantage to the Appellant: If therefore the Evidence of the Witnesses proposed to be examined in *France*, is not to be taken in presence of the Judges of the Court of Session, but upon a Commission, it ought only to be executed by such Commissioners as shall be named by that Court, without any Limitation or Restriction, and under the Conditions formerly prescribed.
- VI. The Law of *Scotland* supposes, that in a private Examination carried on by one of the Parties, a Witness may be led to say what he does not sufficiently know, or very different from what he would say upon a strict and proper Examination; and in order that he may tell the Truth freely, the Court provides that he may tell it with Impunity, by suppressing or cancelling his former Depositions, that they may not rise in Judgment against him.—This being the uniform established Rule in *Scotland*, the Appellant most humbly insists, if the Examination of the Witnesses before the *Tournelle*, or of those who have revealed to the *Curees*, is allowed to proceed, that the Court of Session ought to make the actual Suppression, or cancelling of these Depositions, a Condition indispensably necessary before their Examination; for the Cancellation certainly is equally practicable, as the Inspection, which the Court of Session has made a preliminary Condition: And it is in vain for the Respondents to pretend, that they have used all possible Means for obtaining both the Inspection and Cancellation of this Evidence; for it is manifest they did not take the proper Measures for this Purpose, as in all their *Requettes* they still kept their favourite Points in View, and by applauding the Propriety of the *French* Method of proceeding, and of the *French* Laws, they procured the *Arrete*, which now denies either Cancellation or Inspection of the Evidence.
- VII. If the Appellants shall only be allowed Inspection of the *Tournelle* Evidence, as ordered by the Interlocutor of the 27th of *July* 1763, it is manifest this Inspection ought to be extended to the Declarations of the Witnesses examined before the *Curees*, as prayed for by the Appellant's Petition of the 22d of *December* 1763, in respect, these Witnesses must, in every View, be considered in the same Light as those examined before the *Tournelle*, where their Examinations are actually lodged, and make a Part of the Proceedings in the criminal Action.
- VIII. In Consequence of the Action brought before the *Tournelle*, and the Respondent's irregular Proceedings, the Execution of the Commission from the Court of Session has been prevented, whereby the Appellants have been brought to a very great and extraordinary Expence, which by all the Rules of Justice they ought to be repaid, before the Parties can go into further Proofs, as prayed for by the Appellant's Petition of the 17th of *December*, and which was refused by the Interlocutor of the 21st of *December* 1763, appealed from.

The Respondents have entered a *Cross Appeal* to your Lordships, from the Interlocutors before recited of the 27th of *July*, and 11th of *August*, with regard to such Part of the Conditions annexed to the Execution of the said Act and Commission, as cannot, according to the established Laws of *France*, be complied with; and from the first mentioned Interlocutor of the 21st of *December* 1763, in so far as it adheres to these two Interlocutors, by subjecting the Respondents to the former Conditions, previous to the Examination of any Witnesses, Part of which Conditions do now appear to be impracticable; and in so far as it refuses the Desire of the Petition of the 3d of *December* 1763; and also from the other Interlocutors of the 21st of *December* 1763, refusing the Desire of the Respondent's Petition of the 9th of *December* 1763, concerning the Exhibition of certain Writings therein mentioned: But the Appellant humbly hopes that the said *Cross Appeal* will be dismissed, for the following, among other

R E A S O N S.

- I. If the Respondent should be released from the Conditions contained in the Commission from the Court of Session, for the Re-examination of the *Tournelle* Witnesses, as insisted on by the *Cross Appeal*, it is manifest they would reap every Advantage they had in View by these unjust and irregular Proceedings: The Applications made by the Respondents to the *Tournelle*, and to the *French King*, for procuring Inspection or Cancellation of this Evidence, were drawn up in such a Manner as rather to prevent than to attain what was desired; they load the Appellant's Parents with the most unjust Reproaches, and positively aver, that they had discovered the Appellant's real Parents now residing in *Paris*.—They represent that the constitutional Regulations for Trials in *France* had been treated in the Court of Session, by the Appellant, as arbitrary and oppressive.—They pour forth the most high and immoderate Commendations on the Proceedings before the *Tournelle*, and in all their *Requettes* they anxiously express a Salvo, that the *Tournelle* Prosecution may still subsist.—Thus it has been owing to the Respondents, that the *French King* has not suffered the Commission from the Court of Session to be executed in its own Form, and under the Conditions prescribed by it, as being inconsistent with the Secrecy requisite in the Proceedings before the *Tournelle*.—It is in vain for the Respondents to say that these Conditions are now become impracticable, and that the Laws and Ordinances of *France* oppose either the Inspection or Cancellation of the Evidence before the *Tournelle*; for it is urged as a Maxim universally established in the *Memoire et Consultation*, signed by seven of the Respondents most eminent Council at *Paris*, "That a Commission from a foreign Court of Justice is to be executed according to the Forms and Manner practised and prescribed by that Court, and that the Commissioners cannot vary from or dispense with any of the Forms or Orders so prescribed: *Delegatus non habet Jurisdictionem propriam sed vice fungitur delegantis*;" and this was enforced by the Precedents in *France*, by which it appeared, that where Commissioners under a *French* Commission, acted at *Turin* and at *Rome*, in a Manner different from the Proceedings in *France*, the Execution of that Commission was declared a Nullity: And it was further insisted, "That the Secrecy required in criminal Proceedings was a Regulation peculiar to *France*, and ought to give Way to the Law of Nations, by which the Commission of the Court of Session must be executed according to the Laws and Regulations of *Scotland*."—Upon these Principles therefore, the Respondents cannot, with any Colour of Justice, desire to be released from the Orders and Directions of the Court of Session in taking the Proofs in *France*.
- II.

II.

The Respondents were called upon by two several Petitions, presented on Behalf of the Appellant, to disclaim and discharge the *Tournelle* Prosecution. This they have not only refused to do, but in all their Pleadings and Writings, both in *Scotland* and *France*, they have still insisted that this was a competent Action, which they had a real Interest to continue and to bring to a Conclusion.——By this obstinate Perseverance, in a Measure manifestly unjust and irregular, there has arisen a Collusion between the Court of Session and the Courts of *Paris*; and the Respondents cannot now be permitted to say, that the Execution of the Commission of the Court of Session is now impracticable in *France*, until it is known what Effect their disclaiming the Criminal Action may have, in obtaining a fair and impartial Examination of Witnesses, which is the only Object of the Appellant's Desire.

III.

The Interlocutor of the 21st *December* 1763, likewise complained of by the Cross Appeal, proceeded upon the most solid Principles of Justice.——By that Interlocutor, the Court refused to order the Appellant's Agent to exhibit upon Oath, all the Writings, without Distinction, which had been transmitted to him at the Desire of Sir *John Stewart*, by the Persons who had been entrusted with the Custody of those Writings.——It is established by the Law of *Scotland*, and admitted by the Respondents, that in *Civil Causes* no Person shall be obliged to lay open his Writings to the Inspection of the other Party: If any particular Deed or Writing is specified, in which the Party has an Interest, it must no doubt be exhibited; but in the present Case, the Respondents have not offered to specify any Writing, or even what Kind of Writings they desire.——They say, the present Action is of a *Criminal* Nature, tending to the Discovery of a Species of Forgery or Fraud; but most certainly the Respondents will not be permitted, at their own Pleasure, to convert an Action purely *Civil*, into one of a *Criminal* Nature.——Their original Declaration regards the Appellant only, who is in every View innocent, and has no Tendency to the Punishment of Fraud, or any other Crime whatever: And therefore, the general established Principle must take Place, that the Plaintiffs can only be entitled to call for Exhibition of such Writings as they shall particularly specify, and which they have a manifest Interest to use, for the Purpose of the present Action, which the Appellant has ever been ready to comply with.

FL. NORTON.
FRA. GARDEN.
JA. BURNET.
DAV. RAE.

Archibald Douglas of Douglas, Esq., } Appellants.
and his Guardians, . . . }

His Grace the Duke of Hamilton, Lord
Douglas Hamilton, and their Guar- } Respondents.
dians, Sir Hew Dalrymple and others, }

Et c Contra.

CASE of Archibald Douglas, Esq., Appellant in
the Original, and Respondent in the Cross Appeal.

To be heard at the Bar of the House of Lords on Tuesday
the 10th Day of April 1764.

ET. NORTON
TRA. GALLIN
IA. BURNET
DAV. R. R.